IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.567 OF 2003

Prabhakar Dhondiram Waghchaure,
Hindu Adult, reisidng at Pirtakali,
Post Tire, Taluka Mohal, District
Solapur and presently underoging
sentence at Thane Central Prison,
Thane. ..Appellant
(Orig.Accused No.1)

V/s

The State of Maharashtra
(at the instance of Rabale
Police Station, Thane) ..Respondent.

ALONG WITH
CRIMINAL APPEAL NO.1068 OF 2003

Ravindra Machhindra Mhamane ...Appellant
(Orig.Accused No.2)

V/s

The State of Maharashtra
(At the instance of Rabale P.
Stn., Thane) ...Respondent.

Mr. Anil Lalla i/b M/s. Lalla & Lalla for the appellants in both the appeals.

Mr. D.P. Adsule, APP for the State in both the appeals.

CORAM: V.M. KANADE, J.
DATE : 8th February, 2005

ORAL JUDGMENT:

1. Heard the learned Counsel for the appellant and

the learned APP for the State.

2. Appellant in Criminal Appeal No.567 of 2003 is the original accused No.1 and the appellant in Criminal

Appeal No.1068 of 2003 is the original accused No.2. Both the appellants are convicted by the Trial Court in Special Sessions Case No.336 of 2002 by the Special Judge, Thane for the offence punishable under sections 17, 20 and 22 of the Narcotic Drugs & Psychotropic Substances Act and sentenced to suffer R.I. for 10 years and to pay fine of Rs 1 lakh and in default to undergo R.I. for one year.

3. The prosecution case in brief is that P.W. 6 - P.I. Ghule attached to Rabale Police Station received an information on telephone that two persons were likely to arrive in a Trax Jeep bearing No.MH-13-H-52 and that they were carrying opium in that jeep. Accordingly, the information was reduced in writing and an entry was made in the Station Diary. This fact was disclosed to the A.C.P. in writing and the Investigation Officer Ghule summoned two panchas and kept watch near the Bus Stop and, at about 6.30 p.m., they stopped the Trax jeep and the occupants of the vehicle were apprised of their rights under section 50 of the N.D.P.S. Act. One rexine bag was found on the front seat and it was placed between the two occupants. After the bag was searched, it was found that there was opium in that bag. The contraband was weighed on the weighing scale and it was found to be

2.880 kgs. The FIR was registered and, thereafter, muddemal property was sent to Chemical Analyser who submitted a report that the contraband was opium containing 0.64% Morphine. The Trial Court framed charge against the appellant. The accused pleaded not guilty to the said charge.

4. The prosecution examined 7 witnesses in support of its case. The Trial Court on the basis of the said evidence convicted the accused and sentenced them to suffer R.I. for 10 years.

5. The learned Counsel appearing on behalf of the appellant has taken me through the judgment and order of the Trial Court as also the entire oral and documentary evidence on record. He submitted that the prosecution had not examined the Chemical Analyser and, as a result of the non-examination of the Chemical Analyser, the report of the Chemical Analyser could not have been relied upon. He submitted that in the absence of any data disclosing the tests which were performed by the Chemical Analyser, mere production of the C.A.'s report was not sufficient to establish that the accused were carrying opium. In support of the said submission, he relied on the

judgment of this Court in the case of **Nicklaus Peter Heel Vs. State of Goa** reported in **1998(2) Mh.L.J. 884**. He also relied upon the judgment of this Court in the case of **Mohammad Hanif Mansoori Vs. State of Maharashtra** reported in **2003 ALL MR (Cri) 506**. He also relied upon an unreported judgment of this Court in Criminal Appeal No.27 of 1997 (Deenkhan Mohd. vs. State of Goa) and he finally relied upon the judgment of the Gujarat High Court in the case of **Mahmad Hanif Shaikh Ibrahim Vs. State of Gujarat** reported in **1995(4) Crimes 274**. He further submitted that the charge which was framed by the Trial Court was defective and though opium was allegedly seized from the accused, the charge under sections 20 and 22 of the N.D.P.S. Act was framed. He submitted that according to the Chemical Analyser's report, the substance which was found fell within the definition of section 2(xv)(a) which was punishable under section 18 of the N.D.P.S. Act. He submitted that the Trial Court, however, wrongly framed a charge under section 17 of the N.D.P.S. Act. He submitted that as a result of the defective charge being framed, a serious prejudice was caused to the accused and on that count the finding recorded by the Trial Court was liable to be set aside as the trial was vitiated. He relied upon the judgment of this Court in the case of

Mohammad Ismail s/o. Karim Patil Ansari Vs. State of Maharashtra reported in **2003 ALL MR (Cri) 273**. He, thereafter, submitted that the prosecution had not established any nexus between the appellant and the vehicle which was seized. He submitted that there was no evidence on record to indicate that the vehicle was owned by the appellant. He, therefore, submitted that the accused was entitled to be acquitted. In support of the said submission he relied on the judgment of this Court in the case of **Hiralal s/o. Gauruddin Gore & Anr. Vs. State of Maharashtra** reported in **2004 ALL MR (Cri) 3325**. He also relied upon the judgment of this Court in the case of **Antony Sauri Pilley Vs. State of Maharashtra** reported in **1993 CRI.L.J. 1502**. He further relied upon unreported judgment of this Court in Criminal Appeal No.359 of 1999 (Mohd Enshael Vs. Customs). 6. He further submitted that after the contraband was seized, the sample was taken by the Investigating Officer. However, the sample was not deposited in the safe custody in the Police Station but was retained by the Investigating Officer and it was directly given to the Chemical Analyser. He submitted that, therefore, it was not safe to rely on the sample which was given to the Chemical Analyser. In support of the said submission he relied upon the judgment of this Court in the case of **Mohd. Hussain**

Babamiya Ramzan Vs. State of Maharashtra reported in **1994 CRI. L.J. 1020** and on the judgment of this Court in the case of **Gangaram Rama Gundkar and another Vs. State of Maharashtra** reported in **2002 CRI L.J. 2578**.

6. The learned Counsel for the appellant further submitted that from the Chemical Analyser's report, it can be seen that the percentage of Morphine was 0.64 and considering the percentage, the total weight of the contraband would come to 186 gms which is not a commercial quantity and which is slightly more than the small quantity. He submitted that, therefore, the sentence may be reduced. In support of the said submission he relied upon the judgment of this Court in the case of **Chandrakant Khare Vs. State of Maharashtra** reported in **2004(2) Bom.C.R. (Cri) 127**.

7. The learned Counsel appearing on behalf of the State has vehemently opposed the submission made on behalf of the the appellant. He submitted that merely because there is an error or some irregularity in framing the charge, that by itself would not vitiate the trial. In support of the said submission, he relied upon the judgment of the Supreme Court in the case of **State of West Bengal Vs. Laisal Haque and**

another etc. reported in **AIR 1989 SC 129**. He also relied upon the judgment of the Allahabad High Court in the case of **Mirza Vs. State of U.P.** reported in **1996 CRI. L.J. 472**. He further relied upon the judgment of the Allahabad High Court in the case of **New Victoria Mills Co. Ltd. Vs. Presiding Officer,** reported in **AIR 1970 Allahabad 210**. The learned APP further submitted that it was not open for the appellant to now raise the issue of non-examination of the Chemical Analyser. He submitted that the Chemical Analyser's report was admitted by the defence and, therefore, the Chemical Analyser was not examined by the prosecution. He submitted that this issue was not raised in the Trial Court and now is being raised for the first time in the High Court. He submitted that the contraband was seized from the vehicle in which the accused were travelling. The Chemical Analyser's report clearly indicates that the contraband contained opium. The Chemical Analyser's report is admitted. He submitted that conscious possession was proved. he submitted that once the conscious possession of the contraband was proved by the prosecution, the burden was on the accused to rebut the presumption which was raised under section 35 of the N.D.P.S. Act. In support of the said submission, he relied upon the judgment of the Supreme Court in the case of **Madanlal**

and another Vs. State of H.P. reported in **2003 SCC (Cri) 1664** and also on the judgment of the Supreme Court in the case of **Megh Singh Vs. State of Punjab** reported in **(2003) 8 SCC 666.**

8. In the present case, the accused was arrested on 5/7/2002. The provisions of Amendment Act of 2001 of the N.D.P.S. Act, therefore, are clearly applicable to the facts of the present case. In view of this admitted position, it will have to be seen whether the quantity which is seized from the custody of the appellant is a commercial quantity or a small quantity as defined under the provisions of the N.D.P.S. Act. According to the Chemical Analyser's report, the percentage of Morhpine in the sample was 0.64. In view of the percentage of Morphine in the said sample, the actual quantity seized would come to 186 gms which is less than the commercial quantity.

9. It will not be possible to accept the submission made by the learned Counsel appearing for the appellant that on account of non-examination of the Chemical Analyser, no reliance can be placed on his report as there was no evidence to indicate the manner in which the sample was tested in the laboratory, particularly in view of the fact that the C.A.'s

report was admitted by the defence in the Trial Court and the submission of the learned Counsel APP for the State will have to be accepted that had any objection been raised to the C.A.'s report, the prosecution would have examined the Chemical Analyser.

10. Though it is the duty of the prosecution to prove beyond the reasonable doubt that the sample which was sent to the C.A. was properly tested and after following the procedure and qualitative test by suitable chemical methods the results are obtained yet, in view of the fact that the C.A.'s report is admitted by the defence, it is not possible to accept the submissions made by the learned Counsel appearing on behalf of the appellant. There cannot be any two opinions regarding the effect of non-examination of the C.A. and the consequences which would follow as a result of non-examination of the C.A. yet, in the instant case, in view of the fact that the C.A.'s report is admitted, the distinction will have to be made with the ratio laid down in the aforesaid judgments relied upon by the learned Counsel appearing on behalf of the appellant.

11. So far as the second submission of the learned Counsel for the appellant is concerned regarding the

defect in framing the charge, his contention that the prejudice is caused to the accused as a result of improper framing of the charge cannot be accepted. A consistent view which has been taken by this Court is that the duty of the Court is to find out whether any substantial prejudice is caused as a result of improper framing of a charge. Section 464 of the Code of Criminal Procedure reads as under:-

> "**464. Effect of omission to frame, or absence of, or error in, charge.**-(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.
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> (2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-
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> (a) in the case of an omission to frame a

charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit :

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

The essence of requirement of section 464 is that the Court has to examine the facts of the case in order to determine whether serious prejudice has been occasioned as a result of improper framing of the charge and accordingly the provisions of sections 461, 462 lay down various situations and circumstances which have to be taken into consideration by the Court. It is no doubt true that the charge which is framed by the Trial Court pertaining to the commission of an offence under sections 20 and 22 is definitely improper as only the opium was allegedly found in the

vehicle in which the accused were travelling. There was no occasion, therefore, to frame the charge under sections 20 and 22. However, so far as the charge regarding possession of opium is concerned which is specifically mentioned in the said charge and section 17 has been added in hand. Though it is no doubt true that appropriate section would be section 18 and not 17, in view of the fact that the charge refers to conscious possession of opium, no serious prejudice is caused to the accused. The submission of the learned Counsel for the appellant, therefore, cannot be accepted and the ratio of the judgment of the Supreme Court in the case of **Mohd. West Bengal Vs. Laisal Haque and another etc.** reported in **AIR 1989 SC 129** will be squarely applicable to the facts of this case. In para 9 of the said judgment, the Apex Court has observed as under:-

> "9. In the celebrated case of Willie (William) Slaney v. State of Madhya Pradesh, (1955) 2 SCR 1140: (AIR 1956 SC 116), Vivian Bose, J. speaking for the Court after an elaborate discussion observed that in judging a question of prejudice, as of guilt, the Courts must act with a broad vision and look to the substance and not to the

technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. That test is clearly fulfilled in the facts and circumstances of the present case. The principles laid down by that very eminent Judge in Slaney's case have throughout been followed by this Court. See K.C. Mathew Vs. State of Travancore-Cochin, (1955) 2 SCR 1057 : (AIR 1956 SC 241), Gurbachan Singh v. State of Punjab, AIR 1957 SC 823, Eirichh Bhuian v. State of Bihar, 1963 Suppl (2) SCR 328 at Pp. 336-37 : (AIR 1963 SC 1120 at P.1123) and State of Maharashtra v. Ramdas Shrinivas Nayak, (1982) 2 SCC 463 : (AIR 1982 SC 1249)."

So far as the judgment of this Court in the case of **Mohammad Ismail Karim Patel Ansari Vs. State of Maharashtra** reported in **2003 ALL MR (Cri) 273** is concerned, in the said case, the facts were slightly

different and no specific reference was made in the charge regarding recovery of part of the brown sugar in personal search which was made by the Investigating Officer and, in that context, the Division Bench observed that serious prejudice was caused to the accused. However, facts in the present case are entirely different and a specific reference is made in the charge regarding recovery of opium which was alleged to be in the conscious possession of the appellant.

12. In my view, the prosecution has established beyond the reasonable doubt that the accused were in conscious possession of opium and, therefore, the conviction will have to be confirmed. However, so far as the sentence is concerned, considering the fact that the contraband which was found contained 0.65% of Morphine and the resultant possession of opium would come to 186 gms, the possession of heroin would, therefore, be less than the commercial quantity. The amended provisions of the N.D.P.S. Act which came into effect on 2/10/2001 would be squarely applicable to the facts of the present case. Both the appellants were arrested on 5/7/2002 and they having already undergone almost two and half years in Jail, as per the amendment in sections 17, 20 and 22, the sentence

will have to be altered and reduced to the one already undergone by the appellants.

13. In the result, the following order is passed:-

O R D E R

. Appeal is partly allowed. The order of conviction against both the appellants is confirmed. However sentence is reduced to 2 years and 6 months and fine amount is reduced to Rs 25000/- each and, in default, appellants shall undergo the R.I. for one month and 15 days. Appellants be released forthwith on completion of the above period.

V.M. KANADE, J.